IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

- against -

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York, and JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JONATHAN A. WEISS
CHRISTOPHER H. CLANCY
Attorneys for Petitioner
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

INDEX

	Page(s)
TABLE OF CASES	i-ii
TABLE OF AUTHORITIES	iii
DECISION OF THE COURT BELOW	A1-A6
GROUNDS OF JURISDICTION	v
QUESTIONS PRESENTED FOR REVIEW	vi
STATUTES INVOLVED	vii
STATEMENT OF THE CASE	viii
REASONS FOR ALLOWANCE OF THE WRIT	1-15
CONCLUSION	16

APPENDIX

Judge Bonsal's Decision, dated March 25, 1974.....	A1-A6
Order from Second Circuit, dated December 5, 1974	A7-A8
Statutes and Regulations Involved	A9-A10

TABLE OF CASES

	Page(s)
Bermudez v. U.S. Dept. of Agric., 490 F.2d 718 (D.C. Cir. 1973)	3
Carter v. Butz, 479 F.2d 718 (D.C. Cir. 1973)	3
City of New York v. Richardson, 473 F.2d 923 (2nd Cir. 1973)	10
Clackamas County, Oregon v. McKay, 219 F.2d 479 (D.C. Cir. 1954)	2
Edelman v. Jordan, 94 S. Ct. 1347 (1974)	1, 3, 4, 8
Fairmount Creamery Co. v. Minnesota, 275 U.S. 70 (1927)	5, 6
Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1918)	8
Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939)	13
Lawson v. Shuart, 323 N.Y.S.2d 488 (S. Ct. Nas. Cty. 1971).	15
Lindsay v. Wyman, 372 F. Supp. 1360 (S.D. N.Y. 1974)	11
Long Beach v. Metcalf, 103 F.2d 483 (9th Cir. 1939)	13

TABLE OF CASES (cont'd)

	Page(s)
Miguel v. McCarl, 291 U.S. 442 (1934)	2
Missouri, Kansas & Texas Ry. Co. v. Hickman, 183 U.S. 53 (1901)	13
Porter v. Warner Holding Co., 327 U.S. 395 (1947)	6
Preston v. Barbaro, 305 N.Y.S.2d 627 (S. Ct. Nas. Cty. 1969) ..	15
Rothstein v. Wyman, 467 F.2d 226 (2nd Cir. 1972)	1, 3, 4
Scheurer v. Rhodes, 416 U.S 232 (1974)	7
Young v. Shuart, 325 N.Y.S.2d 113 (S. Ct. Nas. Cty. 1971)	15

TABLE OF AUTHORITIES

Page

STATUTES

28 U.S.C. §1254(1) v

42 U.S.C. §601ff ix

42 U.S.C. §602(a), (b) A9

New York Const. Art. IX,
§9(1)(c) 12
§9(a)(c)(1)..... 12
§9(2)(c)(5)..... 12

New York Municipal Home
Rule Law, §10 12

New York Social Services
Law, §91 11

New York Social Welfare
Law, §56 14

New York Social Welfare
Law, §62(1) 14

REGULATORY AUTHORITY

18 N.Y.C.R.R. §353.3(a)(2).... A9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

- against -

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York, and JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Fermina Montez, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in

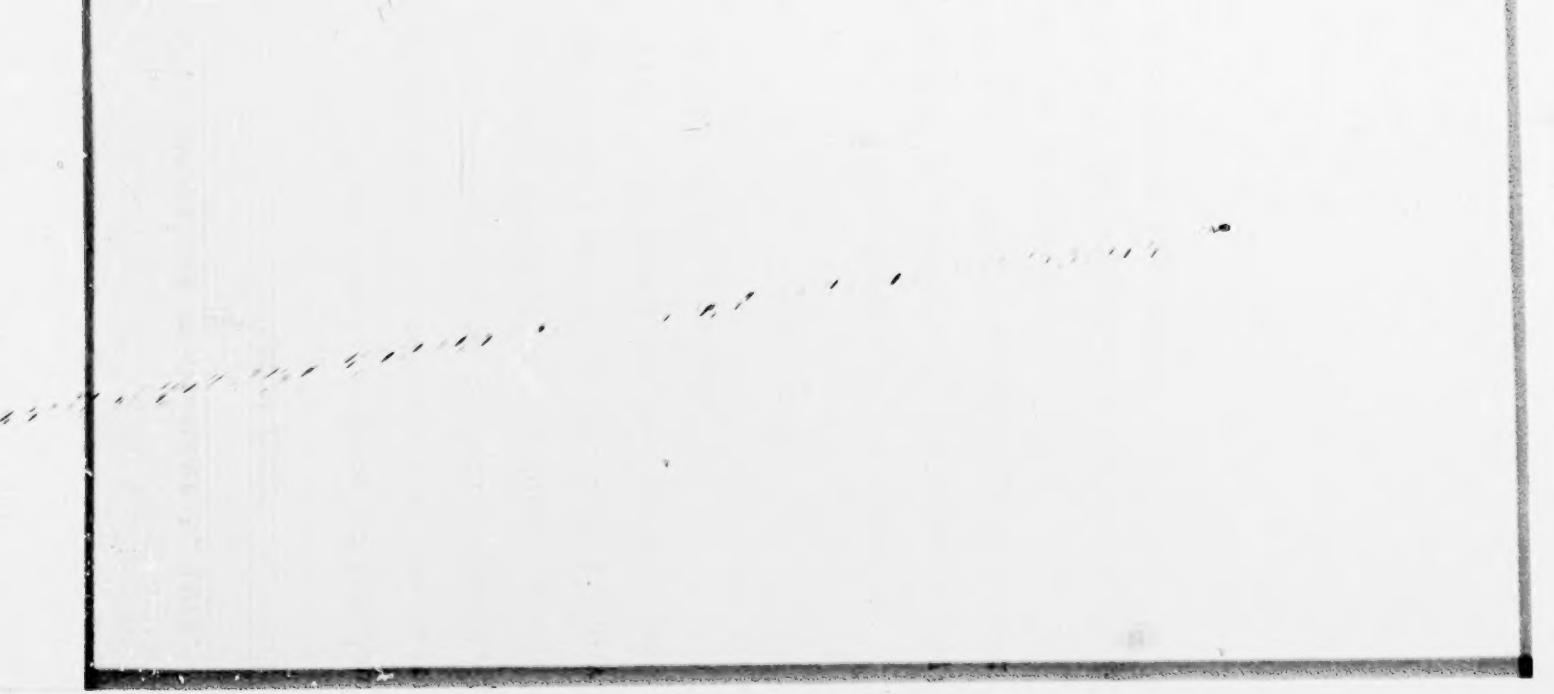
this proceeding on December 5, 1974.

OPINION BELOW

There was no opinion of the Court of Appeals. The decisions of the District Court were rendered by Dudley Bonsal, D.J., Southern District of New York, on May 7, 1973 and March 25, 1974 (69 Civ. 4773). The decisions and opinion are annexed in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1974. This petition for certiorari is issued within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).



QUESTIONS PRESENTED

Where a welfare recipient was denied money under statutory provisions (step-father rule) declared unconstitutional by this Court and sought only that sum of money denied after the welfare department corrected its computation to pay the full amount:

1. Does the District Court have power to award the denied benefits?

2. Does the immunity afforded to states by the Eleventh Amendment extend to municipalities and municipal officials in a suit for specific money damages?

STATUTES INVOLVED ARE:

28 U.S.C. §1254(i)

42 U.S.C. §601ff

42 U.S.C. §602(a), (b)

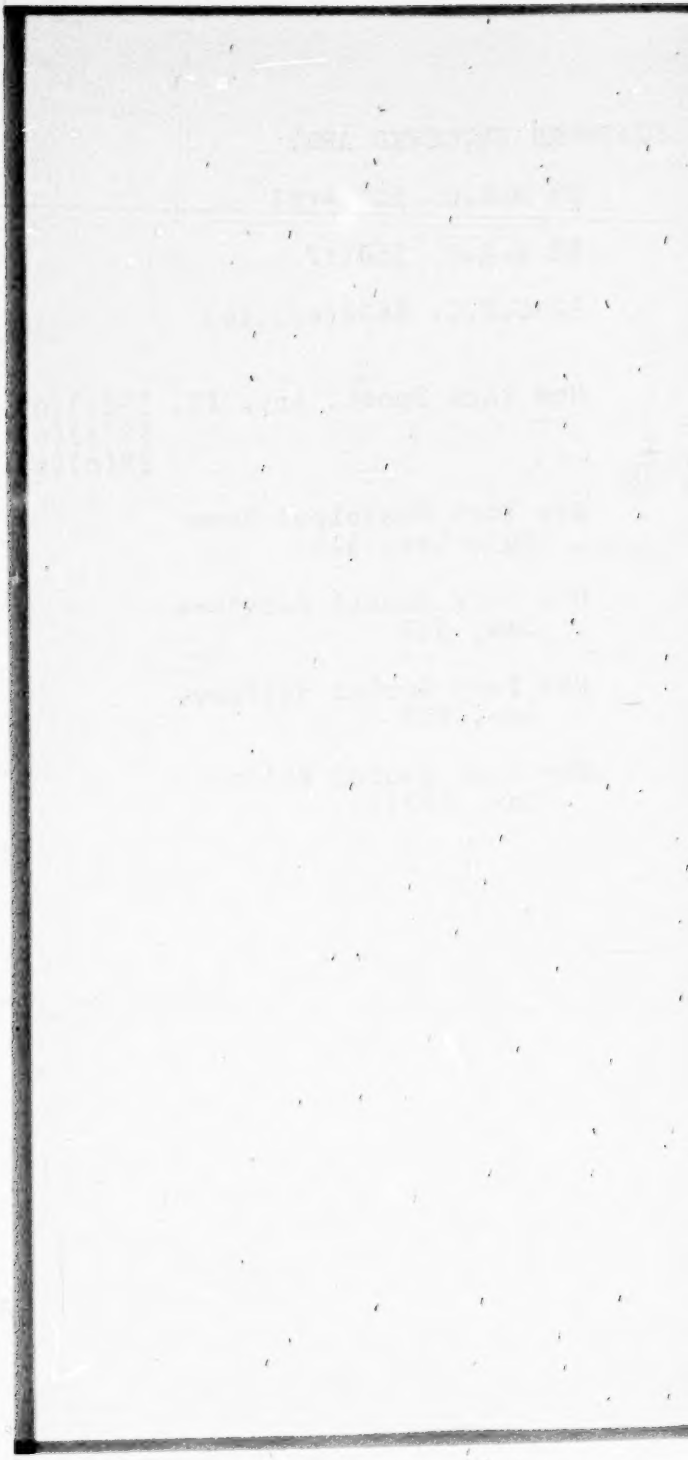
New York Const. Art. IX, §9(1)(c)
§9(a)(c)(1)
§9(a)(c)(5)

New York Municipal Home Rule Law, §10

New York Social Services Law, §91

New York Social Welfare Law, §56

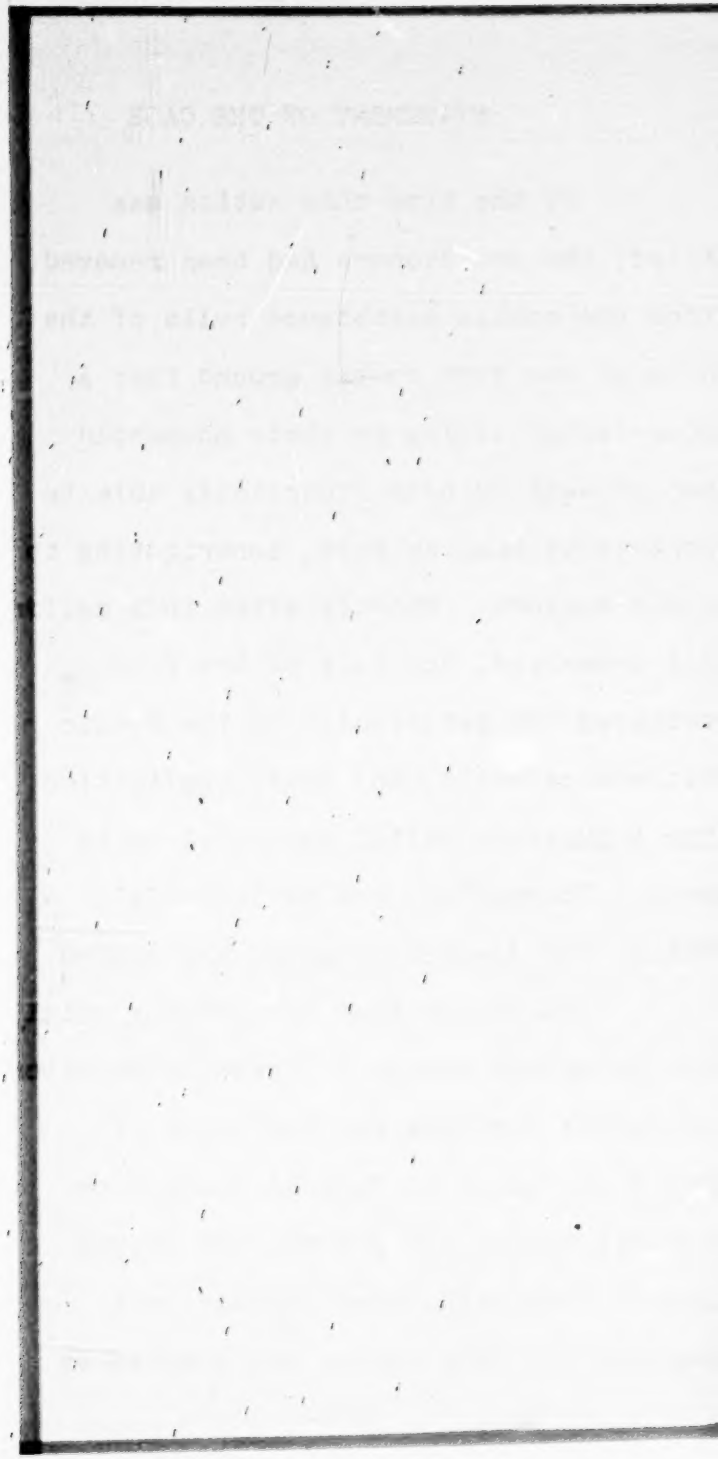
New York Social Welfare Law, §62(1)



STATEMENT OF THE CASE

At the time this action was filed, the petitioners had been removed from the public assistance rolls of the City of New York on the ground that a step-father living in their household was presumably both financially able to contribute and, in fact, contributing to their support. Shortly after this action was commenced, the City of New York restored the petitioners to the Public Assistance rolls, and their application for injunctive relief was ruled to be moot. Thereafter, the petitioners' Motion for Summary Judgment was denied.

While the case was pending trial, the defendant George K. Wyman, Commissioner of Social Services for the State of New York, moved to dismiss the action against him on the ground that he was immune from suit under the Eleventh Amendment. That motion was granted by



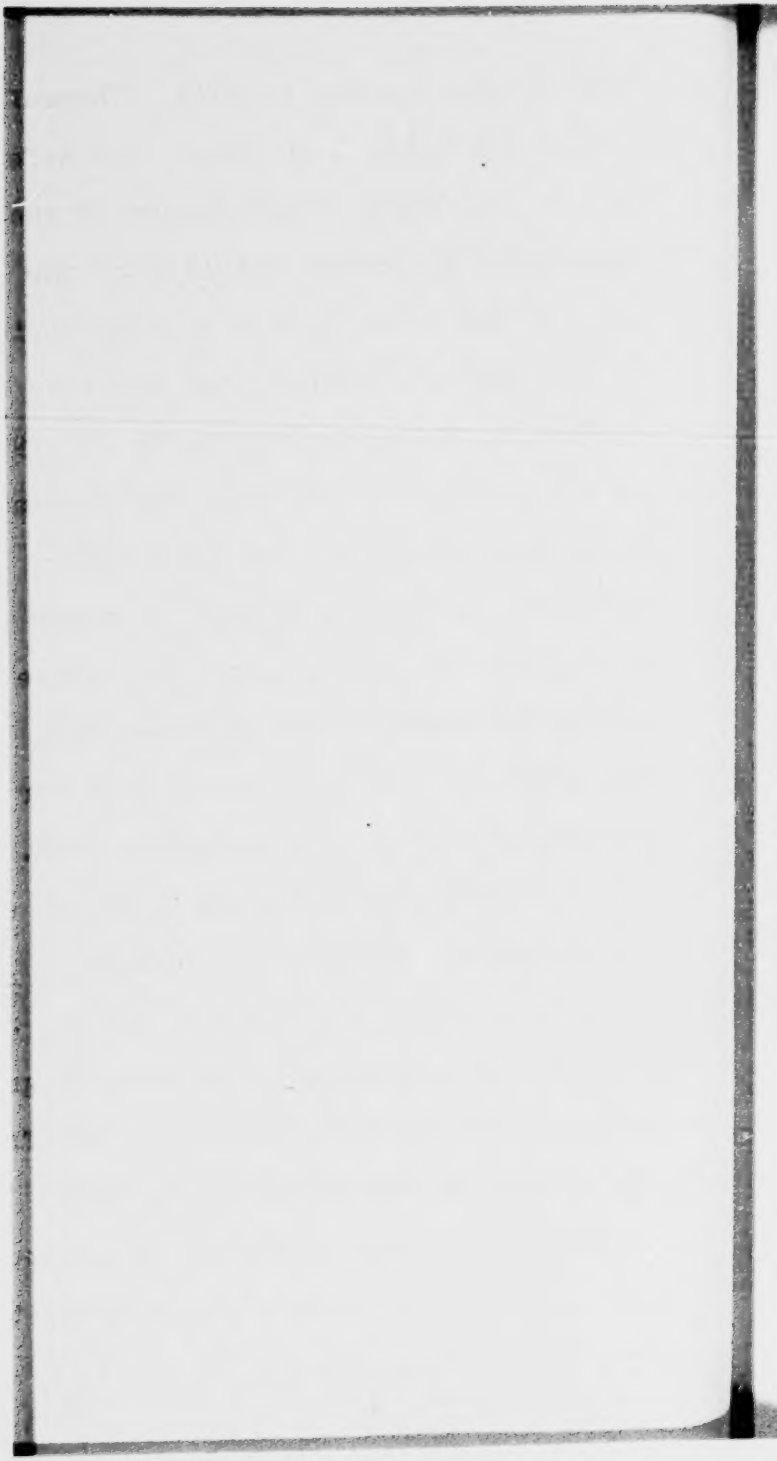
Judge Bonsal on May 7, 1973. Thereafter, during pre-trial conference, the defendant Jack R. Goldberg, Commissioner of the Department of Social Services of the City of New York, made a similar motion to dismiss, and that motion was also granted by Judge Bonsal, March 25, 1974 on the grounds of the Eleventh Amendment sovereign immunity. The petitioners appealed, and the dismissal of their action for declaratory and injunctive relief and damages was affirmed from the Bench by the Court of Appeals for the Second Circuit, December 5, 1974.

The petitioners are a mother and two children, recipients of public assistance under the federal Aid to Families with Dependent Children program (hereinafter "AFDC"), 42 U.S.C. §601ff. The father of the infant plaintiffs abandoned the family and his whereabouts are unknown. He contributes nothing to

the support of his children.

In January, 1969, petitioner Fermina Montez re-married to Luis Perdomo. The respondents then completely terminated the petitioners' AFDC payments; they presumed that merely because Luis Perdomo had married Fermina Montez, he would support not only his new wife but also his two infant step-children. In fact, Mr. Perdomo has been unable and unwilling to contribute to the support of these two children, who are not his own, and he has not done so.

Since the petitioners' assistance was restored after this action was commenced, the only issue which must still be decided is whether the petitioners are entitled to recover benefits denied during the period which their assistance was reduced or terminated by the defendants pursuant to an unlawful statute and regulations. The Court of Appeals affirmed



the support of his children.

In January, 1969, petitioner Fermina Montez re-married to Luis Perdomo. The respondents then completely terminated the petitioners' AFDC payments; they presumed that merely because Luis Perdomo had married Fermina Montez, he would support not only his new wife but also his two infant step-children. In fact, Mr. Perdomo has been unable and unwilling to contribute to the support of these two children, who are not his own, and he has not done so.

Since the petitioners' assistance was restored after this action was commenced, the only issue which must still be decided is whether the petitioners are entitled to recover benefits denied during the period which their assistance was reduced or terminated by the defendants pursuant to an unlawful statute and regulations. The Court of Appeals affirmed

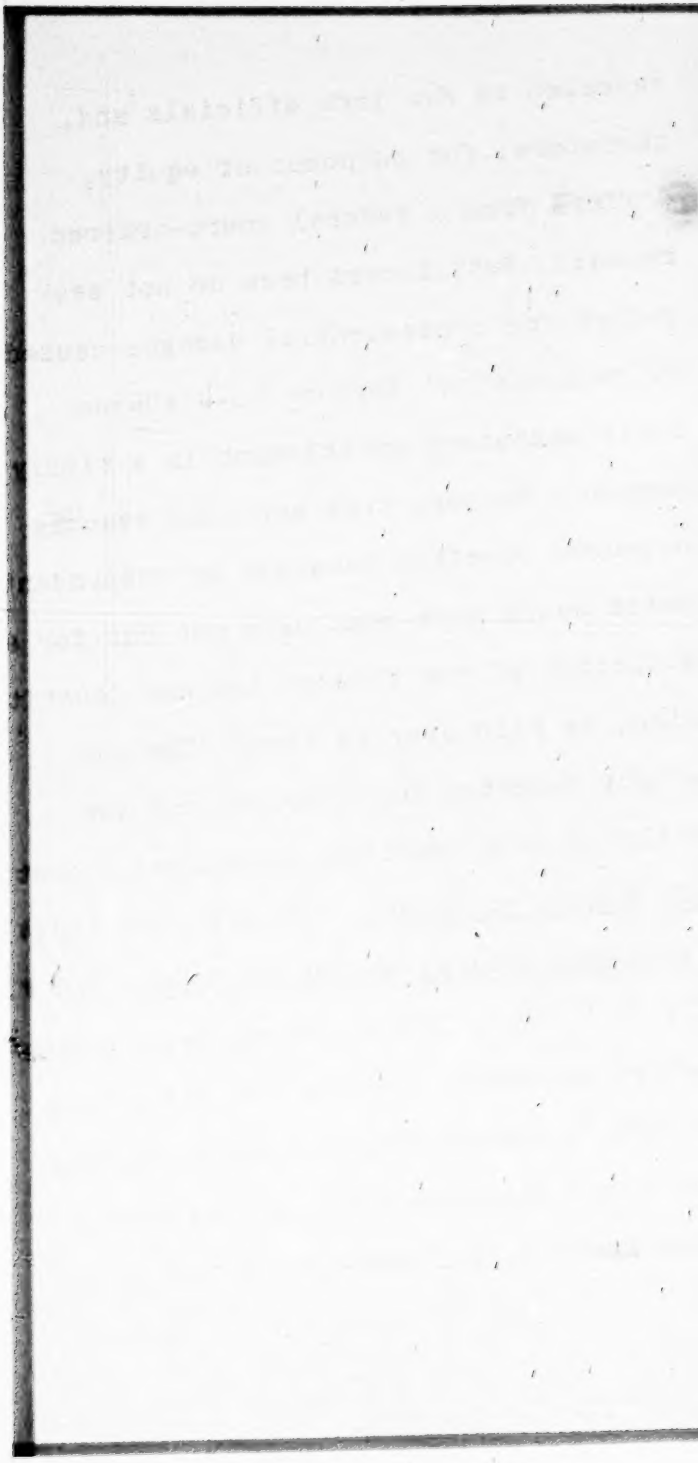
Judge Bonsal's ruling that there was no basis for the Court to exercise its equity powers to grant benefits and that the action should be dismissed.

POINT I

THE STATE SHOULD NOT BE PERMITTED TO INVOKE SOVEREIGN IMMUNITY IN A CASE INVOLVING A SMALL, SPECIFIC SUM DENIED PURSUANT TO AN UNCONSTITUTIONAL REGULATION, LATER VOLUNTARILY REPEALED, AS SUCH A CLAIM IS OUT OF THE PURVIEW OF ROTHSTEIN AND EDELMAN.

The instant application for Certiorari differs from this Court's decision in Edelman v. Jordan, 94 S. Ct. 1347 (1974) and the decision relied upon for dismissal of this suit by the Court of Appeals, Rothstein v. Wyman, 467 F.2d 226 (2nd Cir. 1972), cert. denied 411 U.S. 921 (1973), in many crucial and determinative respects. Both Edelman, supra, at 1356 and Rothstein, supra, at 236-237, were class actions involving substantial amounts of money. The present case is not, of course, a class action nor does it involve substantial or indeterminable amounts of money. The challenged regulation in the instant case was voluntarily

repealed by New York officials and, therefore, for purposes of equity, differs from a Federal court-ordered repeal. Petitioners here do not seek relief for consequential damages caused by respondents' failure to disburse their statutory entitlement in a timely manner. Rather, they ask that exactly measured benefits retained by respondents, which would have been paid out but for a violation of the federal law and Constitution, be paid over to them. The sum sought budgeted for a mother and two children -- a specific liquidated amount. Cf. Miguel v. McCarl, 291 U.S. 442 (1934); Clackamas County, Oregon v. McKay, 219 F.2d 479 (D.C. Cir. 1954). Thus, here, retroactive adjustments would not add to the already budgeted administrative expense but would disburse those monies which comprise the full measure of the



statutory entitlement (under $1,000.00).* Cf. Carter v. Butz, 479 F.2d 1084 (3rd Cir. 1973); Bermudez v. U.S. Dept. of Agriculture, 490 F.2d 718 (D.C. Cir. 1973).

Both Edelman, supra,:

> But we must judge the award actually made in this case. And not one which might have been differently tailored in a different case. at 1357.

and Rothstein, supra,:

> [T]here may perhaps may be cases in which the prompt payment of funds wrongfully withheld will serve that end. (retro-active benefits.) at 235.

suggest that the remedy sought here might exist in a different factual

---

* The State and City have offered rival figures for calculation, even suggesting no money is due as stated in the District Court's opinion, but the claim of no money due rests upon holding the step-father liable for medical care and the precise amount could be measured by a Master.

situation. In fact, Rothstein, supra, relied upon by this Court in Edelman, supra, specifically referred to the type of factual differences in this case and the problems both admininistratively and equitably incurred by the Court and welfare officials if a retroactive award had been made:

> [R]etroactive payments will go to persons no longer on the rolls. at 234. (Mrs. Montez is still on.)
>
> The funds which were misspent are, as a practical matter, irretrievable. It would be unthinkable to order welfare recipients who received federal money under an illegal state program to return their checks. at 235. (There is no question of need, on the one hand, and no danger of misspending, on the other.)

POINT II

THE POWER TO AWARD COSTS AGAINST STATE OFFICIALS PREDICATES THE AWARD OF RETROACTIVE ENTITLEMENTS AGAINST STATE OFFICIALS.

In Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), Chief Justice Taft said:

> That the sovereign is not to be taxed with costs in either civil or criminal cases by rule of court without a statute is undoubtedly true...But is the state to be regarded as a sovereign here? This court is not a court created by the State of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this court loses some of its character as such.
>
> ... A rule of this court as to the awarding and division of costs is, of

> course, not a statute, but such a rule seems to us to be within the inherent authority of the court in the orderly administration of justice as between all parties litigant, properly within its jurisdiction, except the sovereign government.
>
> * * * * * *
>
> ... We think that the rule construed by long practice justifies us in treating the state just as any other litigant, and in imposing costs upon it as such...", supra, at 73-75.

Retroactive benefits, where otherwise appropriate are, like costs, a necessary part of an action to vindicate Constitutional rights. They are not comparable to an award of damages. The Court would simply be "ordering the return of that which rightfully belong[ed] to [them]." Cf. Porter v. Warner Holding Co., 327 U.S. 395, 402 (1947).

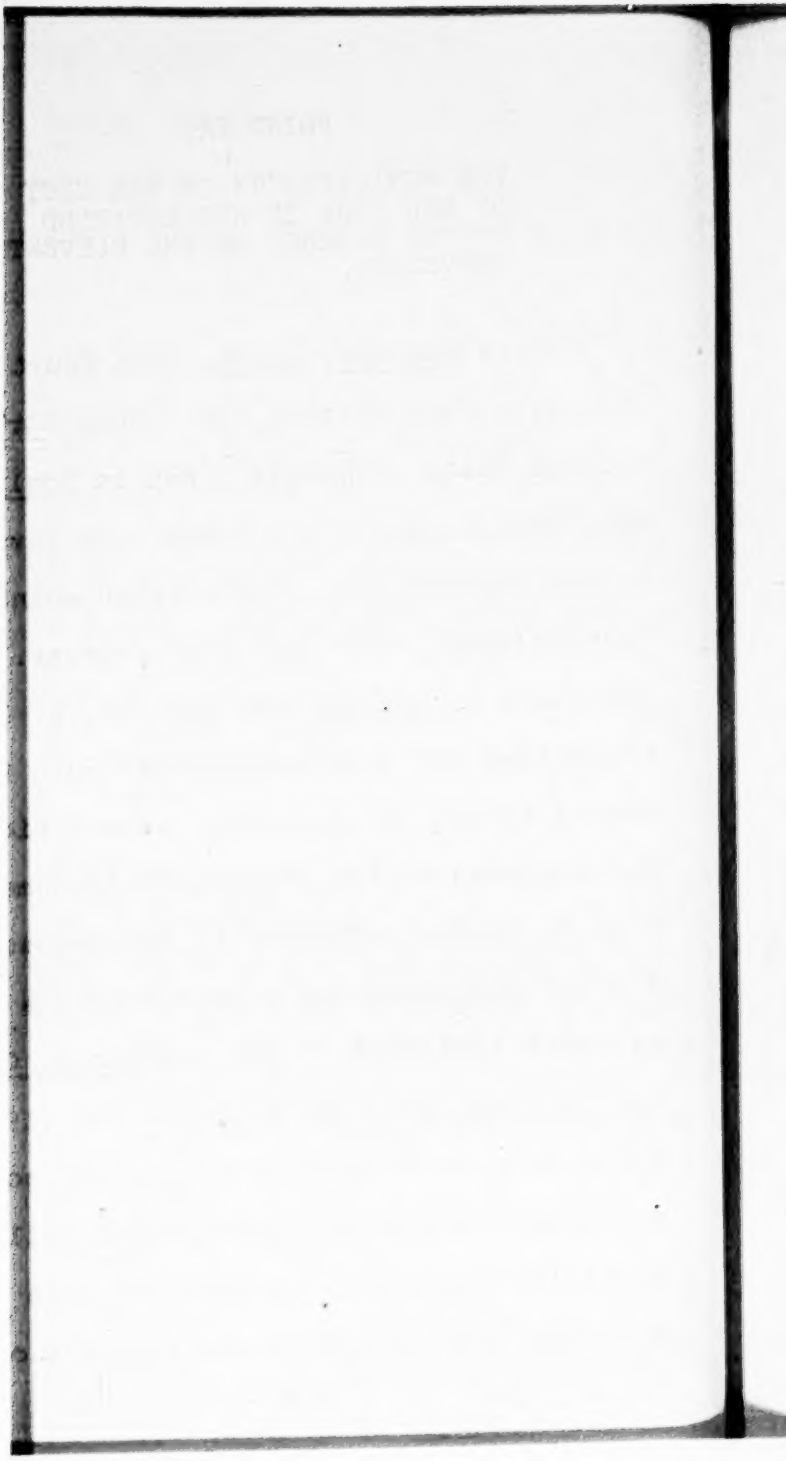
This Court's continuing commitment to vindicating federal constitutional

rights through suits against state officers was manifested in the very recent decision of a unanimous Court in authorizing suits for damages against state officials, Scheuer v. Rhodes, 416 U.S. 232 (1974).

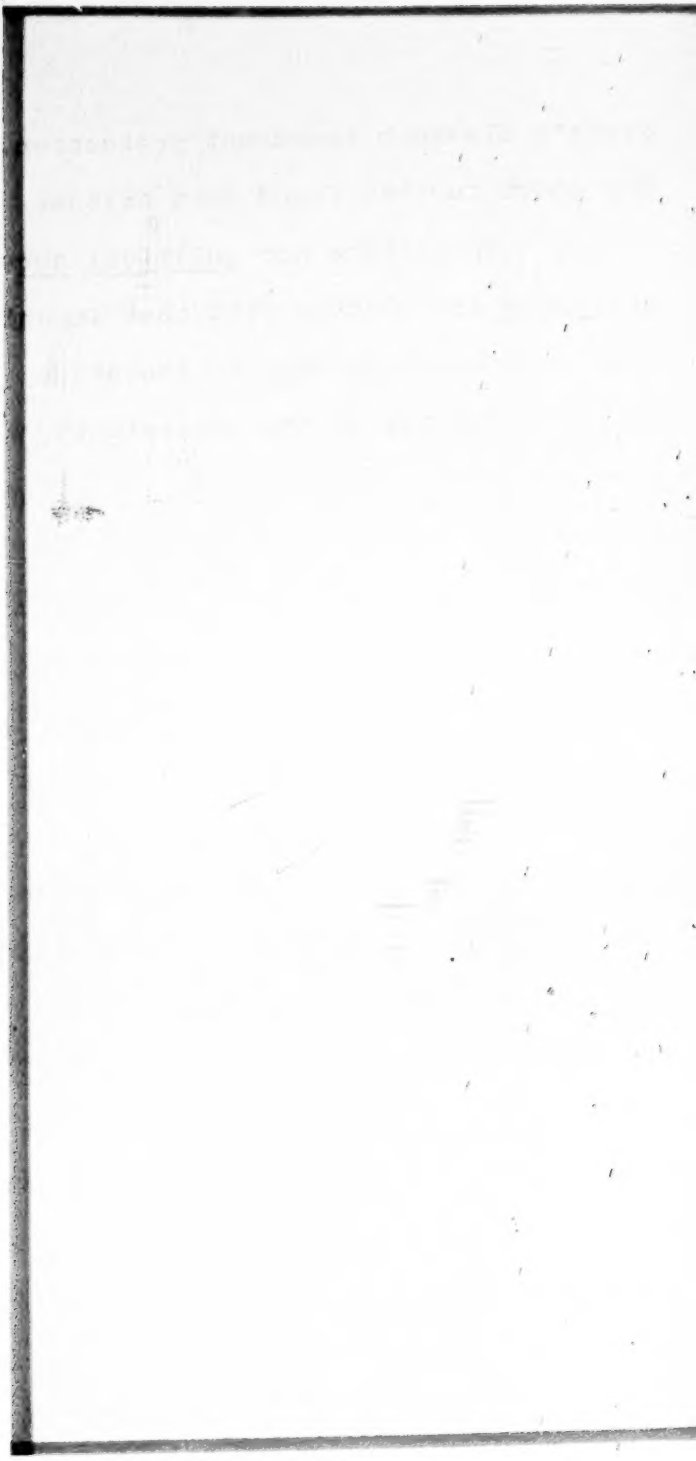
POINT III

THE MUNICIPALITY OF THE CITY OF NEW YORK IS NOT ENTITLED TO THE DEFENSE OF THE ELEVENTH AMENDMENT.

In Edelman, supra, this Court recognized and treated the County Directors as State officials. But in Edelman, only federal and state funds were involved. In the instant case, funds exist emanating from federal, state and city sources. The Court in Edelman, at note 12, p. 1358 recognized the long-established rule that county action is generally state action for purposes of the Fourteenth Amendment but, "a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment." Cf. Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1918) where this court held that a public corporation, such as an agricultural college, receiving state aid and invested with municipal powers cannot avail itself of the



state's Eleventh Amendment protection. The court further found that neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone, by virtue of its sovereignty.



POINT IV

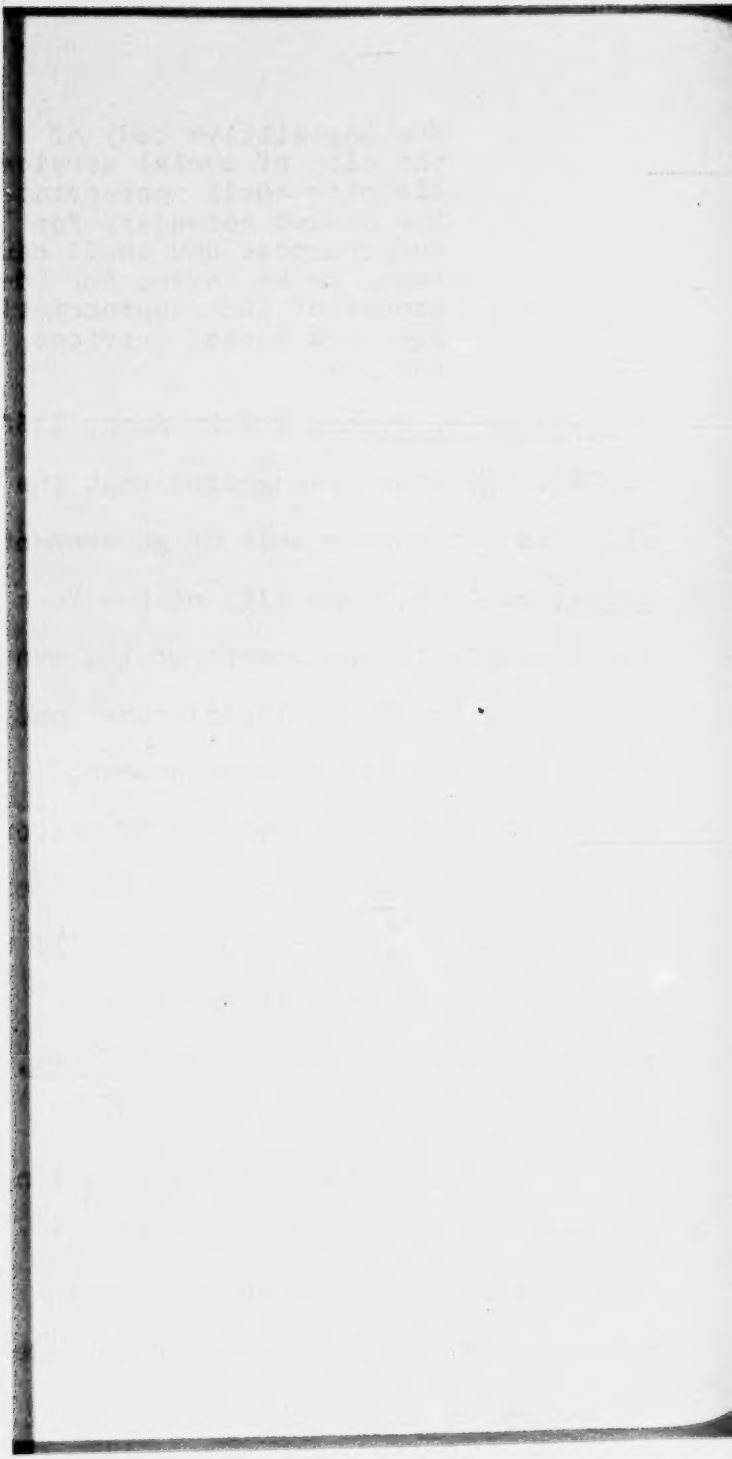
RELIEF AGAINST THE MUNICIPAL CORPORATION OF NEW YORK WOULD NOT BE BARRED BY THE ELEVENTH AMENDMENT AS A SUIT IS AGAINST THE SOVEREIGN, SINCE THE MONEY DOES NOT COME FROM THE STATE OF FEDERAL SOVEREIGN'S TREASURY.

The United States Court of Appeals, Second Circuit itself, has recently stated the differences between the Department of Social Services of the State of New York and the Department of Social Services of the City of New York. In City of New York v. Richardson, 473 F.2d 923 (2nd Cir. 1973), the court recognized that a municipal corporation, created by a State has no privilege or immunities under the federal constitution which it may invoke against the State. The city, by State statute, sets standards for eligibility, payment schedules and the conditions of administration to finance its own public assistance needs.

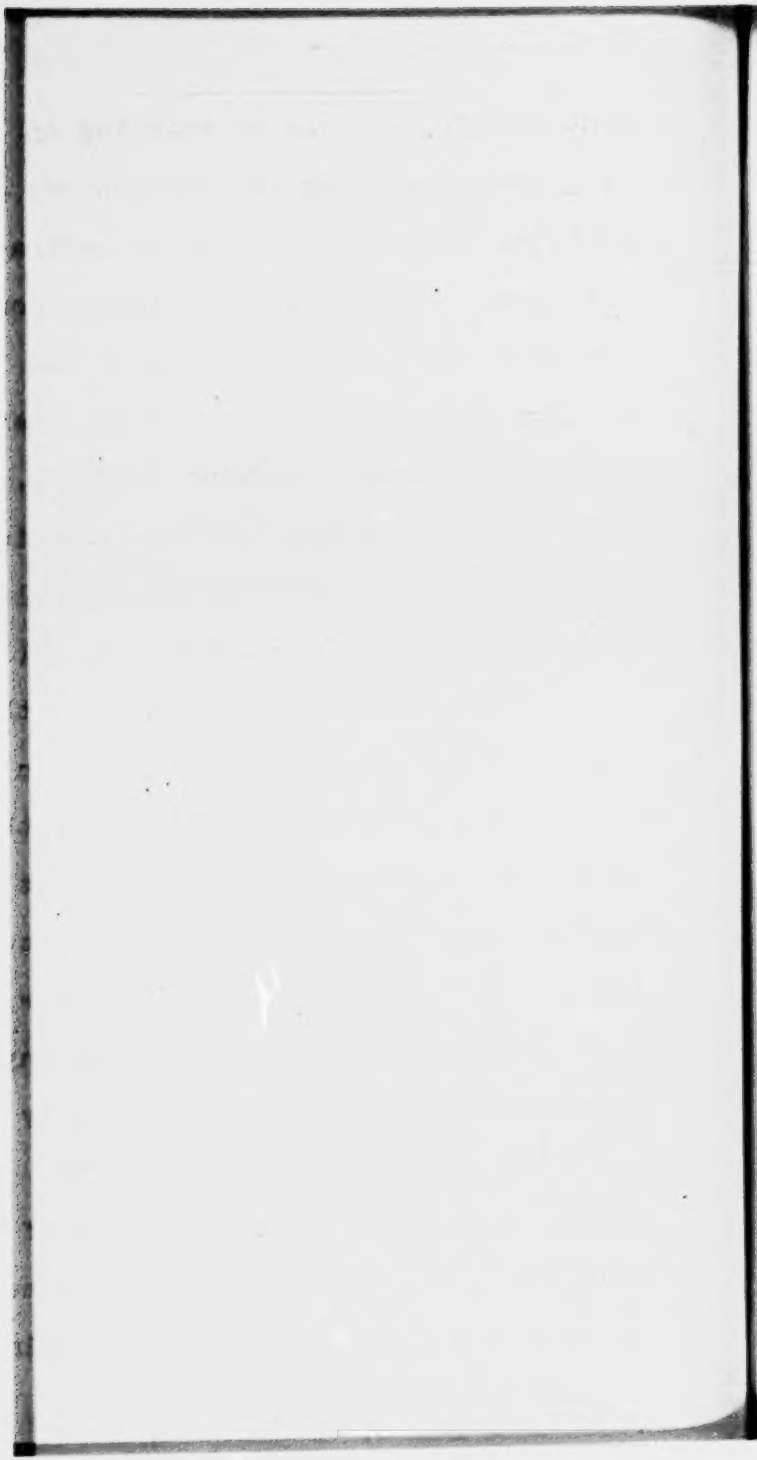
> The Legislative body of the city of social services district shall appropriate the amount necessary for such purpose and shall cause taxes to be levied for the amount of such appropriation. New York Social Services Law §91.

In Lindsay v. Wyman, 372 F. Supp. 1360 (1974), the Court recognized that the city "is a separate unit of government," supra, at 1366, "the city of New York has separate taxing powers of its own granted by the State legislature" and possesses "special revenue powers," supra, at 1368, and that the "function of city government to support the poor ...whatever the State contributes is a grant in aid of what is at least a partial municipal obligation." supra, at 1370.

An examination of the relation between the State and its political subdivision, in order to determine whether the State has created an indepen-



dent entity, capable of existing on its own, and of meeting its obligations and settling claims against it is central to this case. This analysis clearly compels the conclusion that the City of New York and its officials are not within the State's Eleventh Amendment immunity. Article 9 of the New York Constitution deals with Local Governments. Local government (N.Y. Const. Art. IX, §9(1)(c)): They have full control over their employees and their actions (§9(a)(c)(1)). They have full control over the presentation and discharge of claims against them (§9(2)(c)(5)). See also, the New York Municipal Home Rule Law, §10. This result clearly negates any claim of Eleventh Amendment immunity for the City defendant, in view of the policy enunciated above for cases of this kind, and in view of the Supreme Court's stated philosophy of confining



the immunity in general. See Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939).

The Court of Appeals for the Ninth Circuit has held that the Eleventh Amendment does not confer immunity upon municipal corporations. Long Beach v. Metcalf, 103 F.2d 483 (9th Cir. 1939).

Further, in this case there is no showing that the State will, in any way, be directly affected by this suit's effect on the City. It has been established as a matter of Federal law since before the enactment of the Fourteenth Amendment that the result of any subsequent or ancillary proceeding, the outcome of which may in the future affect the State treasury (if in this case the State volunteers to reimburse or is obligated, if they are) is irrelevant to a pending case in Federal court. Missouri, Kansas & Texas Ry. Co. v. Hickman, 183 U. S. 53,

22 S. Ct. 18 (1901). In that case, the court went on to hold that:

> Neither can it be held that the state's voluntary assumption of the costs of the litigation when the decree is adverse to the railroad commission makes it the real party plaintiff. That is simply an incidental matter... 22 S. Ct. at page 21.

Further, this quasi-agency theory goes against the state statute and state case law. The New York State Social Welfare Law §62(1) provides:

> Subject to reimbursement in the cases hereinafter provided for, each public welfare district* shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself.

Thus, the primary liability is upon the

---

* New York City is a public welfare district. New York Social Welfare Law, §56.

City, subject to later State reimbursement in appropriate cases.* Prospective refusal of State reimbursement does not excuse the City's present obligation to the recipient. Lawson v. Shuart, 323 N.Y.S.2d 488 (Sup. Ct. Nas. Cty. 1971) at page 490; see Young v. Shuart, 325 N.Y.S.2d 113 (Sup. Ct. Nas. Cty. 1971) aff'd 331 N.Y.S.2d 962 (App. Div. 2d Dept. 1972); Preston v. Barbaro, 305 N.YS.2d 627 (Sup. Ct. Nas. Cty. 1969) aff'd 311 N.Y.S.2d 997 (2nd Dept. 1970).

There is no basis for extending the State's limited Eleventh Amendment immunity to the City defendant in this case.

* Whether this case is appropriate is, at the present, conjectural under State Law.

CONCLUSION

For all of the foregoing reasons, this court should grant a Writ of Certiorari.

JONATHAN A. WEISS
CHRISTOPHER H. CLANCY
Attorneys for Petitioner
2095 Broadway, Roo, 304
New York, New York 10023
(212) 595-1340

APPENDIX

Memorandum of District Judge Bonsal,
dated March 25, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 4773 #40500

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Plaintiffs,

against

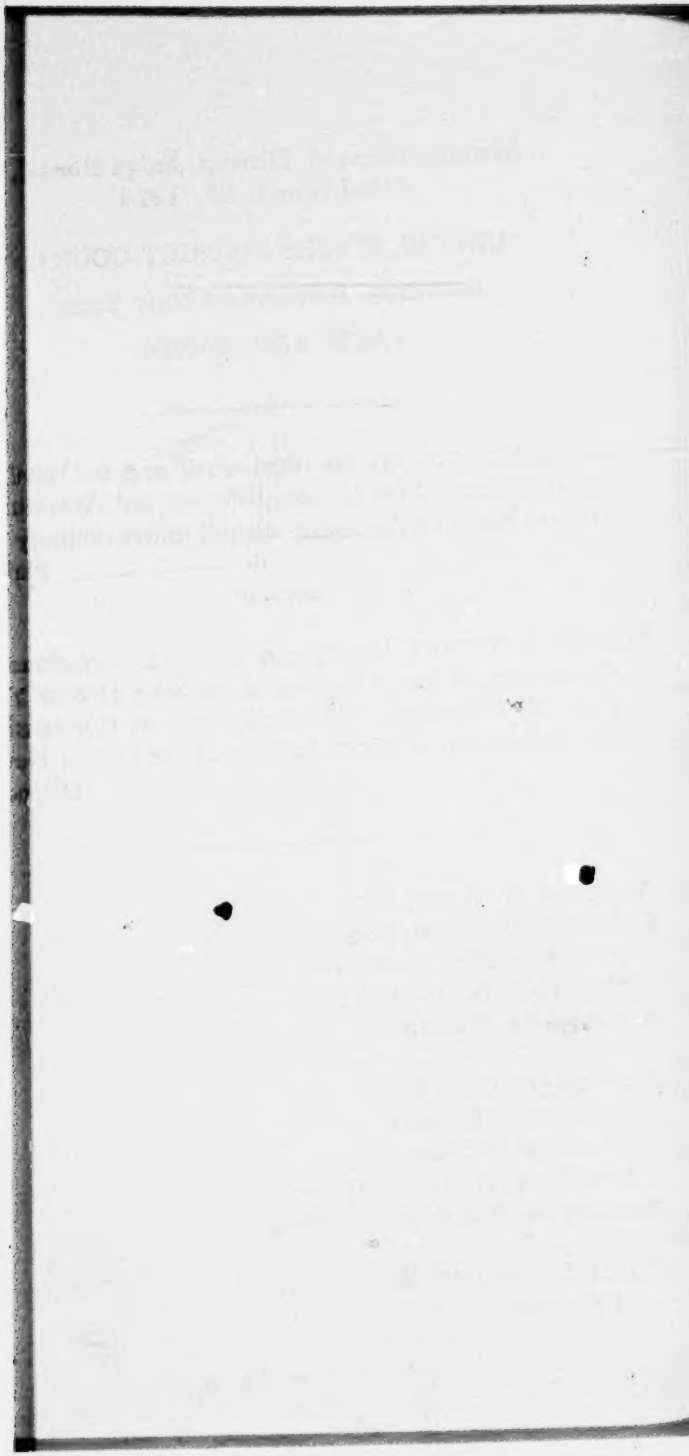
GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York and JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Defendants.

JONATHAN A. WEISS, ESQ.
E. JUDSON JENNINGS, ESQ.
2095 Broadway, Room 304,
New York, N. Y. 10023
Attorneys for Plaintiffs

NORMAN REDLICH, ESQ.
Corporation Counsel
Municipal Building,
New York, N. Y. 10007
Attorney for Defendant Goldberg

GAYLE S. REDFORD, ESQ.
of Counsel



Memorandum of District Judge Bonsal, dated March 25, 1974

MEMORANDUM

BONSAL, D. J.

Plaintiff, on her own behalf, on behalf of her infant children, Jose and Armando Montez, and on behalf of all others similarly situated, instituted this action on October 31, 1969 against defendants, George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York, and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York, seeking relief from the enforcement of § 353.3(a)(2) of the Regulations of the New York State Department of Social Services (18 N. Y. C. R. R. § 353.3(a)(2)), which requires that the income of a stepparent in excess of his own needs as defined by the State be applied against the needs of his stepchildren in their application for assistance. The plaintiff contends that this regulation arbitrarily assumes that the income of the stepparent is available for the support of his stepchildren and that the enforcement of this regulation constitutes a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, the right to privacy, and the Social Security Act (42 U. S. C. §§ 601 et seq.) and the regulations promulgated thereunder (45 C. F. R. §§ 201 et seq.).

The complaint alleges that plaintiff, Fermina Montez, is the mother of Jose and Armando Montez, 12 and 11 years of age respectively; that the children's father, Jose Montez, stopped all support of the children in June of 1968; that plaintiff was forced to leave her employment in June of 1968 to look after her children, who had dropped out of school; that Fermina Montez divorced Jose Montez in October of 1968; that Jose Montez's present whereabouts is unknown, that Fermina Montez married Luis Perdomo in January of 1969; that Luis Perdomo is unable to contribute to the children's support other than the cost of shelter; that plaintiff, Fermina Montez, received public assistance under the Aid to Families with Dependent Children ("AFDC")

program on behalf of the two Montez children; that this aid continued to February of 1969, when she received a "Notice of Intent to Suspend Public Assistance"; that aid was cut off as of February 1, 1969; that at a hearing held on March 11, 1969, plaintiff was required to report her husband's income, to be figured into the calculation of her aid; that on April 2, 1969, plaintiff requested a hearing to review her treatment; and that there was no response to this request. The complaint seeks the issuance of a temporary and permanent injunction, the convening of a 3-Judge Court under 28 U. S. C. §§ 2281 and 2284, a declaratory judgment pursuant to 28 U. S. C. § 2202, and retroactive payments. Jurisdiction is alleged under 28 U. S. C. §§ 1343(3) and 1343(4).

This action has had a varied course. On December 11, 1969, Judge Frankel denied the plaintiff's application for a temporary restraining order and the convening of a 3-Judge Court. He endorsed the moving papers:

> "Plaintiff concedes there is no dispute as to her present or future entitlement, but only an open question as to *past* allowances. The basis for this motion being concededly absent, it is denied. So ordered."

On May 27, 1970, Judge Metzner denied an application by Delia Cancel to intervene as a plaintiff in the action, suggesting that she commence an entirely new action. A new action was commenced, and on August 24, 1970 Judge Cooper: denied plaintiff Cancel's application for the convening of a 3-Judge Court on the ground that no substantial consititutional issue was raised; denied defendants' motion to dismiss the complaint; and granted the plaintiff's motion for an order permitting the action to proceed as a class action under Rule 23, Fed. R. Civ. P. *Cancel* v. *Wyman*, 321 F. Supp. 528 (S. D. N. Y. 1970), *appeal dismissed*, 441 F. 2d 553 (2d Cir. 1971). That action has since been discontinued. 70 Civ. 2359 (S. D. N. Y. Stipulation and Order filed March 6, 1974) (Conner, J.).

Memorandum of District Judge Bonsal, dated March 25, 1974

In the present case, on February 25, 1971 plaintiff moved for summary judgment to recover retroactive payments allegedly due her for the period from February 1, 1969 through December 31, 1969 in the amount of $809.20. On May 5, 1971 Judge Metzner denied the motion, stating:

> "I agree with Judge Cooper that the asserted constitutional bases of plaintiff's claim are insubstantial. On the contention that the regulations [18 N. Y. C. R. R. § 353.3(a)(2)(i) and 45 C. F. R. § 203.1] are inconsistent, I would deny summary judgment since the resolution of the issue is not clear. In fact, it would appear that the result would be contrary to plaintiff's contention. Finally, there is serious doubt, as gleaned from the affidavits, as to whether any sum is due this plaintiff."

On September 20, 1972 an order was entered by this Court dismissing the action for lack of prosecution. However, on motion of plaintiff this Order was vacated on January 18, 1973. On February 14, 1973 defendant Wyman moved pursuant to Rule 12, Fed. R. Civ. P. to dismiss the complaint as to him for lack of jurisdiction, and pursuant to Rule 15, Fed. R. Civ. P. to amend his answer to include the Eleventh Amendment as a bar to retroactive payments as sought by the plaintiff. On May 7, 1973 defendant Wyman's motion to dismiss the complaint was granted. This Court said:

> "In view of Judge Metzner's decision, the only remaining issue is whether plaintiff is entitled to retroactive payments for alleged past deficiencies in her AFDC payments.
>
> . . . . Under the Eleventh Amendment, this court does not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in AFDC payments. [citing cases]."

Memorandum of District Judge Bonsal, dated March 25, 1974

Defendant Goldberg now moves to dismiss the complaint as to him on the ground that the Court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief may be granted.

Plaintiff contends on the basis of the affidavits filed with respect to her earlier motion for summary judgment that she was entitled to a total of $2,384.70 in public assistance from February 1, 1969 through December 31, 1969, of which amount she claims she received $1,575.50, leaving a balance of $809.20. Plaintiff now claims that she was entitled to a total of $3,370.82 for the year 1969, with a balance allegedly still due of $1,795.32. Defendant, however, contends on the basis of cancelled public assistance checks issued to plaintiff and to her husband, Mr. Perdomo, that they together received the sum of $2,051.45 for the year 1969. And defendant also contends that plaintiff's figures of amounts allegedly due are incorrect in that they do not take account of the fact that Mr. Perdomo was placed on plaintiff's welfare budget in April, 1969 and that his income was included into the computation of plaintiff's need during this period.

Under New York Social Welfare Law § 101 (1966), Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. If Mr. Perdomo is included in the calculations, plaintiff would have been entitled to a total of $2,025.18 in public assistance benefits for the year 1969. The affidavits, however, show that plaintiff and her husband received $2,051.45, which is of course more than this amount. In any event, the award of retroactive benefits for alleged past deficiencies in AFDC payments lies within the federal courts' equity powers. See *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972), *cert. denied*, 411 U. S. 921 (1973). On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments. Accordingly, defendant's motion to dis-

Memorandum of District Judge Bonsal, dated March 25, 1974

miss the complaint, treated as a motion for summary judgment, is granted. See Rules 12(b) and 56, Fed. R. Civ. P.

Settle order on notice.

DUDLEY B. BONSAL
U. S. D. J.

Dated: New York, N. Y.
March 25, 1974.

(4538)

PRINTED BY BENJ. H. TYRREL, 110 GREENWICH ST., NEW YORK
Telephone WHitehall 4-9222

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of December one thousand nine hundred and seventy-four.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. ROBERT P. ANDERSON

HON. JAMES L. OAKES

Circuit Judges,

Fermina Montez, on her own half (sic) and on behalf of her infant children, Jose Mirino Montez, and Armando Montez, on behalf of themselves and others similarly situated,

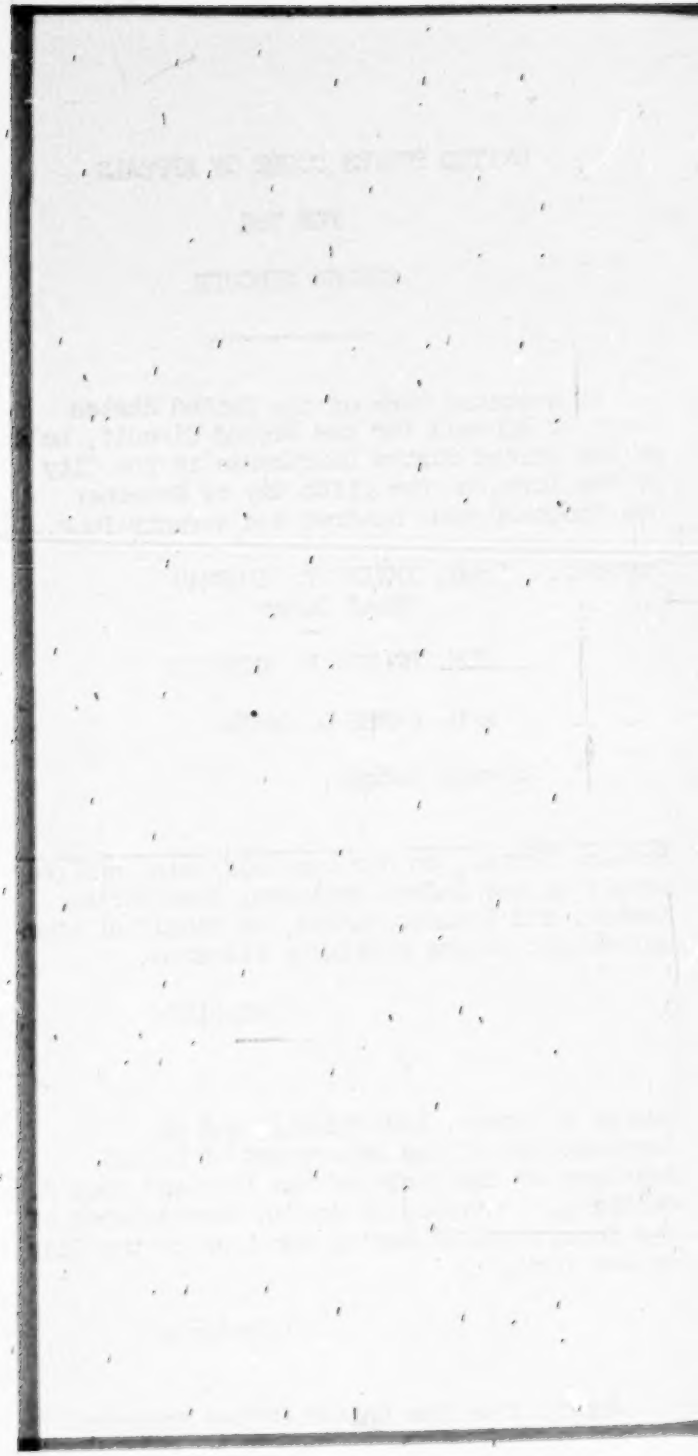
Plaintiffs

v. 74-1613

George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York,

Defendants

Appeal from the United States District



Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

by VINCENT A. CARLIN,
Chief Deputy Clerk

STATUTES and REGULATIONS INVOLVED:

Section 353.3(a)(2), Title 18 N.Y.C.R.R., Determination of Eligibility - General, provides:

> All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, shall be prorated and applied against the needs of the applicant, the spouse and the minor children of either or both. If the spouse is possessed of income but, under exceptional circumstances, refused to make application for assistance and to have his income so applied against the needs of his family, the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own need and any surplus against the needs of his dependents.

Title IV of the Social Security Act, §402(a) and (b), 42 U.S.C. §602(a) and (b):

> (a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by

reason of death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under the State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State.